Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

96-98

In the Matter of	§	
	§	
Petition of MCI for Declaratory Ruling That	§	DA 97-557
New Entrants Need Not Obtain Separate	§	
License or Right-to-Use Agreements	§	CCBPol 97-4
Before Purchasing Unbundled Elements	§	

COMMENTS OF THE PUBLIC UTILITY COMMISSION OF TEXAS
ON THE PETITION OF MCI

The Public Utility Commission of Texas ("PUCT"), through the Office of the Attorney General of Texas, respectfully submits these comments on the petition for declaratory ruling filed by MCI. The PUCT's comments address this Commission's question in its March 14, 1997, Public Notice in this proceeding as to possible ways of eliminating or reducing potential burdens on requesting telecommunications carriers if they are required to independently negotiate licensing agreements with third parties before obtaining access to unbundled network elements.

MCI's request is overly broad.

In its petition, MCI seeks a declaratory ruling "that any requirement imposed by an [incumbent local exchange carrier ("incumbent")] or a state or local government that a new entrant obtain separate license or right-to-use agreements before they can purchase unbundled network elements violates §§ 251 and 253 of the Communications Act of 1996." (MCI

Petition p. 1). As an initial matter, MCI's request is overly broad. By asking this Commission to declare that any such requirement imposed by a state commission violates the Telecommunications Act of 1996,[1] MCI is asking this Commission to review the action taken by a state commission pursuant to § 252 of the 1996. Indeed, MCI specifically complains and seeks review of the PUCT's Arbitration Award in PUCT Docket Nos. 16189, 16196, 16226, 16285, and 16290. (MCI Petition pp. 4-5). Congress, however, expressly provided that judicial review of a state commission's determination is to occur in federal district court--not before this Commission. 1996 Act § 252(e)(6). Although it is entirely appropriate for this Commission to address the issue presented by MCI in this proceeding, it is neither appropriate nor permissible for this Commission, in so doing, to make declarations as to the validity of any state commission's determinations under § 252 of the 1996 Act.

The Commission should adopt an approach that facilitates new entrant access to network elements while respecting bona fide third party intellectual property rights.

According to MCI, the 1996 Act's requirement that incumbents provide new entrants "just, reasonable and nondiscriminatory access" to their unbundled network elements requires incumbents to provide access to elements even where a third party's intellectual property rights are implicated. MCI argues that to do otherwise "would undermine Congress' attempt to open up local markets to competition . . . ." (MCI Petition p. 1). The PUCT agrees that Congress

[1]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), 47 U.S.C. § 251 *et seq.* ("1996 Act").

intended to open up local markets to competition by enacting the 1996 Act. The PUCT believes, however, that Congress did not intend to do so by trampling any intellectual property rights of third parties who provide pieces of the networks utilized by incumbents, which networks must now be shared with new entrants. The Commission's challenge is to fashion an approach to this issue that works toward the end of promoting competition in the local telephone markets while at the same time preserving intellectual property rights of third parties.

The Commission should consider following the approach taken by the PUCT in approving an interconnection agreement between AT&T Communications of the Southwest, Inc. ("AT&T") and Southwestern Bell Telephone Company ("SWB"). After considering the arguments of the parties, the PUCT approved[2] the following provision:

> AT&T is responsible for obtaining any license or right to use agreement associated with a Network Element purchased from [SWB], and further will provide [SWB], prior to using any such Network Element, with either: (1) a copy of the applicable license or right to use agreement (or letter from the licenser attesting as such); or (2) an affidavit signed by AT&T attesting to the acquisition of any known and necessary licenses or right to use agreements. [SWB] will provide a list of all known and necessary licenses or right to use agreements applicable to the subject Network Element(s) within seven days of a request for such a list by AT&T. [SWB] agrees to use its best efforts to

[2]The PUCT required this provision to be included as a part of the SWB/AT&T interconnection agreement only if the parties desired to include an intellectual property indemnification provision in their agreement. SWB sought to have a provision included that would require new entrants to completely indemnify and hold SWB harmless from any third-party claims. AT&T suggested language that would have each party indemnify and hold the other party harmless. The PUCT utilized an intermediate approach including AT&T's proposed language with the additional language quoted below.

> facilitate the obtaining of any necessary license or right to use agreement. In the event such an agreement is not forthcoming for a Network Element ordered by AT&T, the Parties commit to negotiate in good faith for the provision of alternative Elements or services which shall be equivalent to or superior to the Element for which AT&T is unable to obtain such license or agreement.

This approach is a considered and reasonable one.[3]

SWB is required first to identify those third parties whose intellectual property rights may be implicated when a new entrant utilizes SWB's unbundled network elements. With this information in hand, AT&T can contact the third party to determine whether it is even necessary to obtain a license or right-to-use agreement and, if so, negotiate a license or right-to-use agreement satisfactory to both parties. This requirement, if adopted by this Commission, would address MCI's concern that an incumbent be obligated to identify to a new entrant whose intellectual property interests are potentially implicated. (MCI Petition p. 4). It also addresses the concern that incumbents are asserting third party intellectual property rights as a stumbling block to competition when such rights are not in fact implicated. By requiring an incumbent to tell a potential competitor whose third party intellectual property rights may be implicated, the potential competitor can promptly determine for itself whether there is a legitimate impediment to utilizing a particular unbundled network element.

In addition, SWB is required to "use its best efforts" to help AT&T obtain any necessary licenses or right-to-use agreements. This requirement allows AT&T to avail itself

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[3]On March 28, 1997, the PUCT again used this approach in another arbitration proceeding before it involving MCI and GTE in PUCT Docket No. 16355.

of any bargaining power or leverage that SWB has fostered with the third party by its prior relationship with that entity. Moreover, this requirement mirrors Congress' approach in the 1996 Act. Congress imposed on incumbents in the 1996 Act a "good faith" duty to negotiate and work with potential competitors to make local telephone competition a reality by negotiating the terms and conditions by which interconnection can occur. See 1996 Act § 251(c)(1). Were SWB to refuse to use its best efforts to assist AT&T in obtaining any necessary licenses or right-to-use agreements, AT&T would have a breach of contract remedy.

Finally, the PUCT's approach addresses the contingency that, despite the joint efforts of the incumbent and a new entrant, the new entrant may nonetheless be unable to obtain the necessary license or right-to-use agreement from a third party. In that situation, both the incumbent and the new entrant are committed to negotiate in good faith for the provision of alternative elements or services which shall be equivalent to or superior to the element for which the new entract is unable to obtain such license or agreement.

That requirement is consistent with this Commission's response to arguments made by certain incumbents as to unbundling the vertical features of their switches in CC Docket No. 96-98, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*. In its First Report and Order issued in that docket, this Commission stated that "[t]o withhold a proposed network element from a competing provider, an incumbent LEC must demonstrate that the element is proprietary and that gaining access to that element is not necessary because the competing provider can use other, nonproprietary elements in the

incumbent LEC's network to provide service. (First Report and Order ¶ 419) (emphasis added).

This Commission should carefully evaluate the extent to which third party intellectual property rights are truly implicated.

In its Public Notice on MCI's Petition, the Commission indicated that it wants to "build as complete a record as possible" in order to examine carefully the extent to which any third party intellectual property rights are in fact implicated by incumbents' providing access to unbundled network elements. As the Commission observed in CC Docket No. 96-98, certain incumbents raised the intellectual property rights argument in objecting to providing access to their unbundled network elements under section 251(c)(3) of the 1996 Act but not when discussing the resale provisions of section 251(c)(4) of the Act. (First Report and Order ¶ 419). MCI contends that an incumbent's "intellectual property" argument may simply be "a tactic to delay competitive entry." (MCI Petition p. 7). The PUCT commends the Commission's intention to examine the evidence on this issue carefully. The approach utilized by the PUCT would require new entrants to obtain only those licenses and right-to-use agreements that are truly necessary, *i.e.*, legally required in order to preserve the integrity of bona fide intellectual property rights. Any approach adopted by this Commission should do the same.

Respectfully submitted,

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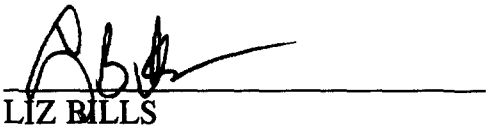

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Comments of the Public Utility Commission of Texas on the Petition of MCI was sent U.S. mail this 14th day of April, 1997, to the following:

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